U.S. Department of Labor

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Issue date: 06Nov2002

CASE NOS.: 2001-LHC-2195/2196

OWCP NOS.: 1-150887/145582

In The Matter Of:

HENRY N. CHEVALIER
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insurer

and

Director, Office of Workers' Compensation Programs, U.S. Department of Labor
Party-in-Interest

APPEARANCES:

Scott N. Roberts, Esq.
For the Claimant

Michael J. Feeney, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: DAVID W. DI NARDI
District Chief Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on March 28, 2002 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offer3ed by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and EX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On November 7, 1998 Claimant suffered an injury to his abdomen/rib cage in the course and scope of his employment.

4. On October 25, 1999 Claimant sustained a pulmonary injury in the course and scope of his employment.

5. Claimant gave the Employer notice of the injuries in a timely manner.

6. Claimant filed timely claims for compensation and the Employer filed timely notices of controversion.

7. The parties attended an informal conference on May 2, 2001.

8. The applicable average weekly wage is $876.07 for his abdomen/rib cage injury.

9. The average weekly wage for Claimant's pulmonary injury is $602.39 if he is found to be an involuntary retiree. If, however, he is a voluntary retiree, the Employer submits that the average weekly wage is the National Average Weekly Wage as of the date of injury. Claimant disputes that the National Average Weekly Wage applies.

10. The Employer has paid temporary total compensation to the Claimant for certain periods of time for his abdomen injury. (EX 2)

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability as a result of both injuries.

2. Whether the Full Faith and Credit Clause of the U.S. Constitution bars further compensation benefits for his abdomen/rib cage injury.

3. Whether Claimant is an involuntary retiree with reference to his pulmonary injury.

4. Claimant's average weekly wage for his pulmonary injury.

5. Claimant's entitlement to medical benefits for the two injuries before this Court.[1]

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
CX 9A	Attorney Roberts' letter filing CX 9, a document admitted into evidence at the hearing	04/11/02
ALJ EX 8A This	Court's **ORDER** relating to post-hearing evidence	04/16/02
EX 14	Attorney Feeney's status report	05/28/02
ALJ EX 9	This Court's **ORDER** with reference to post-hearing evidence	08/23/02
EX 15	Attorney Feeney's letter filing	08/28/02
EX 16	A document entitled NOTIFICATION OF INTENT TO RETIRE EARLY	08/28/02
EX 10	Attorney Roberts' status report	08/29/02
CX 11	Attorney Roberts' status report	09/09/02
EX 17	Attorney Feeney's letter filing the	09/23/02
EX 18	Employer's post-hearing brief, as well as the	09/23/02
EX 19	Section 8(f) brief	09/23/02

The record was closed on September 23, 2002 as no further documents were filed.

Summary of the Evidence

Henry N. Chevalier ("Claimant" herein) sixty-four (64) years of age, with an eighth grade education and an employment history of

[1]The abdomen/rib cage injury of November 7, 1998 has been identified as OWCP No. 1-145582 (ALJ EX 2) (2001-LHC-2196). The pulmonary injury of October 25, 1999 has been identified as OWCP No. 1-150887 (ALJ EX 6) (2001-LHC-2195)

manual labor, began working in 1976 as a sandblaster at the Quonset Point Facility of the Electric Boat Company, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Narragansett Bay and the Atlantic Ocean where the Employer fabricates hull sections, cylinders and other components that are then transported by ocean-going barges to the Employer's Groton, Connecticut shipyard for further assembly and installation upon submarines being constructed or repaired at that shipyard adjacent to the navigable waters of the Thames River. As a sandblaster Claimant used various tools to perform his assigned duties of cleaning the surfaces in preparation for further processing. He described his work environment as "very dusty" and so "dirty" that he could hardly see ten (10) feet away from him. He was exposed to an inhaled asbestos dust and fibers, as well as other injurious pulmonary stimuli such as welding dust, grinding dust and fumes. (TR 26-32)

In 1981 Claimant had pulmonary function tests performed at the Employer's Yard Dispensary and as those tests produced abnormal values, he was not allowed to continue to work as a sandblaster and was transferred to work as a crane maintenance person. Quonset Point had 300 cranes located in the production buildings and Claimant performed both preventative maintenance and actual repairing of the cranes. He continued to be exposed to the various shipyard injurious pulmonary stimuli and he continued in that department until he stopped working on November 2, 1999 because of his multiple medical problems. Although Claimant was told that he had pulmonary problems in 1981, he did not go to see a doctor for evaluation of that problem because he was afraid of losing his job. (TR 32-36)

On November 7, 1998 Claimant and his co-worker were working forty-to-fifty feet in the air from a so-called man-lift in Building 60. He was in the process of lifting an engine weighing "a couple hundred" pounds and he felt a twinge or pain in his chest. He finished his work shift as he was reluctant to complain to his supervisor, and he went home. However, the next day his chest pain had worsened and he reported the injury to his supervisor who sent him to the dispensary. Claimant was told he had a "pulled muscle." As the chest pain continued, he went to see his family doctor who sent him to see Dr. Isaac, a surgeon. Various diagnostic tests were performed and Claimant was told that he had a torn muscle. He was then referred to Dr. Philip Reilly who prescribed physical therapy. However, that treatment worsened the chest pain and was discontinued. He was out of work for a while but he was anxious to return to work and his supervisor put him to work in an office on light duty taking care of the paperwork for the crane department. However, Claimant, because of his limited education, made a number of mistakes and because he was no longer able to work overtime in view of his light duty compensation status, he decided to stop working because of his multiple problems at age 62, although he had wanted to continue until age 65 so that

he could collect his full retirement. He estimates that he lost at least twenty (20) hours of overtime per week. (TR 36-46)

Claimant was given an annual physical exam by the Employer in view of his past exposure to asbestos and other deleterious substances. During one of these exams Claimant's chest x-rays showed pleural plaques -- a so-called objective marker of past asbestos exposure -- and he was referred to Dr. Elizabeth Dolly, a pulmonary specialist. Claimant was diagnosed as having asthma in 1986 or 1987 and Dr. Arcan has treated this condition with inhalers and Slo-Bid. He has also been diagnosed with emphysema, and as being allergic to molds, and with allergic rhinitis. He has also suffered from Class 2 diabetes since 1995 or 1996. Claimant filed for a handicapped automobile parking medallion on August 4, 1999 (CX 9) and he applied for SSA disability benefits around that time. He believes he told his supervisor that he was retiring because of his injuries and his multiple medical problems. He obtained SSA benefits without benefit of an attorney. (TR 47-49)

Claimant's abdominal/rib cage problems are best summarized by the reports of Dr. Philip J. Reilly (CX 7) wherein the doctor reports as follows:

November 10, 2000
Henry Chevalier

Henry returns with a new injury to his right upper abdominal area. Henry injured himself three years previous while lifting a heavy motor. Subsequent to that he came under the care of his internist and then Dr. John Isaac for chronic, upper right-sided abdominal pain. He has remained symptomatic over a period of two years. Currently he is retired. He is very local and points directly to the upper anterior abdominal wall area just below the ribs.

He has had significant workup which has included a CT and an MRI. In viewing the films and the reading, there is no intra-abdominal pathology noted. There is evidence of thinning of the upper obliques just below the ribs.

Chronic medical problems: asthma, asbestosis. He has not had surgery.

He takes Slo-Bid and albuterol inhalers. HE HAS NO ALLERGIES

Review of Systems: no abdominal discomfort.

Social History: He is retired, but he works as a trainor part time.

On exam Henry appears fit and moves quite well. He does have a little protuberance of his abdomen. There is no focal swelling noted. His rib cage per se is nontender. The costochondral junction medially is nontender. As we get laterally, the upper

attachment of the obliques and rectus, he is very tender just below the lower edge of the right rib cage anteriorly is the point of most tenderness. The remainder of the abdomen is nontender. No masses are noted.

I reviewed the MRI and the two reports, the CT and MRI. These suggest thinning of the upper obliques and rectus.

I suspect Henry had a tear of his abdomen obliques and possibly the lateral rectus. It has been two years and I am not sure there is a lot that will impact his symptoms, although some stretching and strengthening may be of some value. I will send him to therapy for a program for his obliques to try and stretch him out and some conservative strengthening exercises. He does not recall trying anti-inflammatories, so we will try a short course of that. Finally, I explained to him that I am not aware of any surgical procedure for a repair or re-attachment that would be of any value. I will check him in two months to see how he is doing, according to the doctor.

On November 13, 2000, Dr. Reilly, an orthopedic surgeon, sent the following letter to Dr. John Isaac (**Id.**):

I recently saw Henry Chevalier for complaints of right-sided, upper abdominal pain. By history and physical exam I think more than likely he sustained tear of his abdominal obliques and possibly lateral rectus at its insertion. It has been two years and he is still symptomatic. I am not sure there is a lot that will impact his symptoms. We will try stretching and strengthening. I will send him to physical therapy to see if a stretching program is beneficial. I will check him in a few months, according to the doctor.

Two months later, Dr. Reilly noted the following in his progress note (**Id.**):

Henry is here for follow-up of a chronic abdominal strain. he is not 100% and still has pain but with therapy he has gotten to the point where he can at least move. He says it has definitely helped. He is still point tender over the proximal rectus and the attachment of the obliques to the ribs.

Henry also has a right shoulder problem. He had bursitis a number of years ago, but for the past six months he has persistent pain. He cannot reach his arm overhead. He has difficulty hanging a jacket. He has some discomfort when he lies on it at night.

Exam of his neck shows full motion. Exam of his shoulder shows he is slightly tender with impingement sign. He has decreased internal rotation. He is weak to resisted supination but not external rotation. On abdominal exam he has good tone, abdomen protuberant. He still has point tenderness.

Henry has a chronic abdominal injury. He has responded to therapy and I think he should just keep on with the exercise program. Stay in therapy a little longer and then do the exercises on his own. Follow up for this problem will be p.r.n.

He also has a right shoulder problem. This is not work related and he will return for shoulder x-rays and subacromial injection with Marcaine and cortisone. Gave an exercise hand-out. I explained that I think he has a rotator cuff tear. He will return at a separate time for evaluation of this injury, according to the doctor.

One month later Dr. Reilly reported as follows (**Id.**):

Henry presents for evaluation of a right shoulder injury. Henry has pain on-again and off-again for a couple of years. More recently as he has been in therapy rehabilitating his abdomen, he has had some increased discomfort. Henry started swimming recently. He has no neck pain or radiating arm pain. He primarily has pain when he lifts his arm.

On physical exam he is fairly robust for a 63 year old. He has fairly good upper body strength. Examining his neck, he has good motion, difficulty at the extremes. Neuromotor exam, skin exam, vascular exam are all intact.

He has a positive impingement sign. The AC joint is nontender. The shoulder is stable. He has slight stiffness to the shoulder, but I can get him up to 170 degrees and abduct to 170 degrees. He can do this but feels discomfort. His biggest complaint is pain with abduction. His motor strength is fairly good. He gives out a little bit with resisted supination and external rotation but overall has 4++ strength.

Radiographs show a tad of irregularity but no significant arthritis. He has type II-III acromion.

Mr. Chevalier clearly has impingement. He may have a small rotator cuff tear. I gave him the exercise hand-outs. We will send him to physical therapy. He has anti-inflammatories at home which he will resume taking.

Henry’s symptoms with regard to his abdominal injury fluctuate. It gets worse, then better. He has limitations. I think this is a permanent injury. ON the basis of motion, he has no impairment. He has permanent, partial disability from physical labor.

In connection with Claimant’s claim for benefits for his abdominal/rib cage injury under the state act, the Employer referred Claimant for an examination by its medical expert, Dr. Robert J. MacMillan, and the doctor sent the following letter on April 12, 1999 to the Employer’s prior attorney (EX 12):

Re: Henry Chevalier
D.O.I. Nov 7, 1998

Dear Mr. Richardson:

I reexamined Mr. Henry Chevalier on April 5, 1999.

Interval History:

Mr. Chevalier states that he returned to work in December, 1998. At first, he performed limited duties, and then resumed work as a mechanic, performing maintenance duties, and as a forklift operator. He continued to experience pain at the same location as noted on my last report, namely, the right upper abdominal area just below the 12th rib. According to the patient, the pain never abated and has remained at a more or less constant level, estimated to be 5 on a scale of 10. Neither working nor leisure activity has much influence on the pin level. He consulted a surgeon, Dr. Isaac, in March, 1999. No surgical pathology was found, and the prior diagnosis of muscle disruption was made. Dr. Isaac concluded that injury to the rectus muscle may have occurred, and since no hematoma was seen on CT scan, self resolution would be expected. **Mr. Chevalier ceased work in March, 1999 because of the pain**, but no relief has yet occurred. The only change noted is that the pin is somewhat less upon awakening in the morning, and worsens at night. He states that he would prefer to return to work. (Emphasis added)

Physical Examination: Inspection of the abdominal area is normal. No hernia is visible. Palpation of the abdomen does not reveal any masses or enlarged organs. He is tender to deep palpation at the same location as previously, just below the 12th rib at about the mid clavicular line. No mass is felt in this region. Strain on the abdominal muscles does not produce any herniation, and does not appear to induce pain. Pain is also elicited with forced extension of the right leg.

Diagnosis: Upper abdominal muscle strain.

Is further treatment needed?: No specific treatment is indicated.

Has treatment been in keeping with Rhode Island Worker's Compensation protocols established for management of this type of injury? I am not aware of any specific protocol for this type of injury. The care to date appears reasonable.

Would return to work be injurious to his health?: The original injury is now 5 months old. Neither work nor rest is reported to significantly affect the pain. There is no evidence of adverse consequences to his health from performing work duties. Therefore, I do not find that return to work would be directly injurious to his health, according to the doctor.

The Employer's Yard Dispensary records for the period of November 12, 1998 through September 9, 1999, in evidence as CX 8, reflect notification to the Employer of the November 7, 1998 abdominal/rib cage injury. While Employer's counsel, in open Court, disputed that Claimant was on light duty until his last day of work on November 2, 1999, those Dispensary records clearly reflect that Claimant kept the Employer advised of the treatment that he was receiving for such injury and, most important, that he, in fact, did return to work on light duty as Dr. Arcand imposed various restrictions on his ability to return to work. In this regard, **see** CX 8 at 2-19, 21-43.

Claimant's pulmonary problems are best summarized by the January 19, 1999 **INITIAL EVALUATION** of Dr. Elizabeth S. Dolly, a pulmonary specialist, wherein the doctor reports as follows (CX 2A):

HISTORY: The patient is a very pleasant 61-year-old gentleman who is followed by Dr. Alfred Arcand. He said that about two months ago he pulled a muscle while at work on his right flank while lifting a very heavy motor. He is some type of maintenance worker at General Dynamics. He said Dr. Arcand has been treating him for this. In his work-up he had a CT scan of his abdomen which revealed a right diaphragmatic plaque. He then had a chest x-ray which confirmed this finding and he was sent here for further evaluation. He has been told in the past that he has asthma or emphysema by Dr. Arcand and has been taking Slo-bid and an Albuterol inhaler for the past few years. He said that he gets good relief with the Albuterol inhaler which he uses probably about twice a day. He said that he thinks he has environmental allergies because he has increased wheezing, coryza, nasal congestion and post nasal drip in the Spring and Fall. He said he uses his inhalers much more at this time. He is a former smoker quitting 17 years ago. Previous to that he smoked 1 ½ - 2 - packs-per-day for 30 years. He said presently on the Slo-bid and Albuterol he feels that his respiratory symptoms are well controlled. He is not having any wheezing at night. He is not awakening short of breath. He said he sleeps well and his appetite has been good. No post nasal drip. No chest pain. No hemoptysis. No fevers, chills, dyspnea. He has never had any type of surgery. Other pertinent past medical history is noncontributory. He has a family history of a brother who died of emphysema. No serious childhood illnesses. The patient says he has significant asbestos exposure doing plumbing work and working in the sandblasting area at General Dynamics. He said he has always lived in Rhode Island. He has one dog at home. He has not had any recent travel. There is no history of any exposure to tuberculosis. He denies dyspnea on exertion or shortness of breath at rest or any other time. He said that he exercises daily and he started this 17 years ago when he quit smoke basically to keep his weight under control. His weight has been quite stable...

ASSESSMENT: This is a pleasant 61-year-old gentleman with a significant asbestos exposure, also a former smoker, who now appears to have chronic obstructive pulmonary disease with asbestosis and probably most likely a bronchospastic component. He also complains of a "pulled muscle" and is being treated for this by Dr. Arcand. His chest x-ray is certainly consistent with asbestosis. Pulmonary function tests are consistent with obstructive dysfunction.

PLAN: I would suggest that he continue with Slo-bid and Albuterol. The patient will have an allergy work-up. I will see him in April with the change of seasons to see if he is having escalation of his respiratory symptomatology at that time. He may need an increase in his medication regimen..., according to the doctor.

Dr. Dolly re-examined Claimant on April 19, 1999, at which time the doctor reported as follows (CX 2C):

S: The patient comes to the office today for follow-up visit. He had been feeling fairly well since his last visit until about one week ago when the seasons started to change. He started to have some increased shortness of breath and coryza with runny nose. He has continued to take Slo-bid and Albuterol. He is now using the Albuterol about 5 times a day. He did see Dr. Ricci and was found to have allergic rhinitis and hypersensitivity to mold. Otherwise he has no other complaints. No hemoptysis. No chest pain. No peripheral edema.

O: BP 130/70. Pulse 90 and regular. HEENT exam- PERLA. TM's are clear. Pharynx is pink without exudate. Neck is supple with full range of motion without palpable adenopathy. Trachea is midline. The chest is normal to inspection and palpation and clear. No wheezes, rhonchi, or rales are appreciated. Heart- regular rate and rhythm, S1 and S2. Extremities are without clubbing, cyanosis, or edema.

A: 1) Asbestosis.
2) Seasonal allergies.

P: The patient will add Flovent 110 2 puffs b.i.d. Continue Albuterol 2 puffs p.r.n. and Slo-bid. Will also add Allegra 60 mg b.i.d., p.r.n. Will follow-up in three months, according to the doctor.

As of July 16, 1999, Dr. Dolly reported as follows (CX 2D):

S: The patient comes to the office today for follow-up visit. He has been feeling very well since his last visit with no exacerbations of his asthma. He has found that the Allegra is helpful in controlling in his allergy symptoms. He has been compliant with the Flovent 110 at 2 puffs b.i.d. He continues to use Albuterol 2 puffs p.r.n. He finds that since he has started

the inhaled steroid his Albuterol use has decreased somewhat. He continues to take Slo-bid. He said a few months ago he was lifting a motor over his head and experienced a muscle tear in his right chest wall. He is being followed by Dr. John Isaac for this and has received some cortisone injections. Otherwise he has no other complaints. No hemoptysis. No chest pain. No peripheral edema. No orthopnea. no fevers.

O: BP 140/70. Pulse 80 and regular HEENT exam- PERLA. TM's are clear. Pharynx is pink without exudate. Nasal mucosa is slightly boggy. Neck is supple with full range of motion without palpable adenopathy. Trachea is midline. Neck veins are flat. The chest is normal to inspection and palpation and clear. No wheezes, rhonchi, or rales are appreciated. Heart- regular rate and rhythm, S1 and S2. Extremities are without clubbing, cyanosis, or edema.

A: 1) Asbestosis.
2) Allergic rhinitis.

P: The patient will continue Flovent 110 2 puffs b.i.d., Albuterol 2 puffs p.r.n., Slo-bid and Allegra 60 mg b.i.d., p.r.n. At his next visit in December he will have a repeat chest x-ray, PFT's and theophylline level, according to the doctor.

As of January 17, 2000, Dr. Dolly reported as follows (CX 2E):

S: The patient comes to the office today for routine follow-up examination. Since the cold weather has started he has been having some increased dyspnea but no wheezing or sputum production. No chest pain or hemoptysis. He has been using his Albuterol about 5 times a day occasionally. He discontinued the Flovent. His sample ran out and he did not know he was supposed to continue it. He still continues to take Slo-bid. Otherwise he has no other complaints. He has had no peripheral edema or orthopnea. No fevers.

O: BP 140/70. Pulse 90 and regular. SA02 is 96% on room air at rest. Weight 169 lbs. Height 67". HEENT exam- PERLA. TM's are clear. Pharynx is pink without exudate. Neck is supple with full range of motion without palpable adenopathy. Trachea is midline. Neck veins are flat. The chest is normal to inspection and palpation and clear. No wheezes, rhonchi, or rales are appreciated. Hear- regular rate and rhythm, S1 and S2. Extremities are without clubbing, cyanosis, or edema.

Pulmonary functions- FVC of 1.95 or 52%, FEV1 of .58 liters or 19% for a FEV1 to FVC ratio of 37%. FEF 25-75% if 7%. Lung volumes reveal hyperinflation. FLCO is 12.2 or 58% of predicted. There is a very significance response to postbronchodilator challenge with improvement of FVC of 68%, FEV1 of 33% and FEF of 35%.

A: 1) Asbestosis.

2) Multiple allergies.

P: The patient will restart Flovent 110 mcg 2 puffs twice a day. Will continue Albuterol 2 puffs p.r.n., Slo-bid. Will obtain a theophylline level and chest x-ray with PA and lateral views and follow-up in four months, according to the doctor.

Dr. Dolly also saw Claimant on May 12 and October 11, 2000, and those progress reports are in evidence as CX 2G and CX 2J, respectively..

Dr. Dolly sent the following letter to Claimant's state attorney on July 14, 2000 (CX 2I):

> **This letter is in reference to my patient, Mr. Henry Chevalier. Mr. Chevalier carries a diagnosis of asbestosis with severe obstructive dysfunction. On the basis of his pulmonary function testing and clinical findings Mr. Chevalier is restricted and also disabled from active employment. I hope this information will be of help to you. Please do not hesitate to contact me in the future.**

Dr. Dolly sent the following letter to Claimant's attorney on November 6, 2000 (CX 2L):

This letter is in response to your request dated 9/25/00. In your letter you explained to me that Mr. Chevalier is entitled to benefits for loss of lung function but regulations indicate that the claim is predicated on lung function volumes after bronchodilator challenge. Apparently, as I understand, after lung function has improved through the use of bronchodilators. Hopefully, the following information will help to clarify this point for you and aid Mr. Chevalier in his claim. As of 1/17/00 Mr. Chevalier's post bronchodilator pulmonary function tests indicated a FVC of 3.27 liters which is 88% of predicted with a FEV1 of 0.77 liters which is 26% of predicted with a FEV1 to FVC ratio of 30% and a FEF 25-75 of the 10%. These are all post bronchodilator values. Considering the FEV1 value, which is 26% of the predicted, that would leave Mr. Chevalier with a lung function loss of approximately 74%. I hope this information will be helpful to you, according to the doctor.

The Employer has referred Claimant for an examination by its pulmonary expert, Stephen L. Matarese, D.O., FCCP,[2] and Dr. Matarese sent the following letter to the Employer on May 1, 2001 (CX 4A):

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[2]I note that Dr. Matarese is located at the same office as Claimant's pulmonary expert, Dr. Dolly.

Mr. Henry Chevalier had an Independent Medical Examination in our office on 5/1/01.

Mr. Chevalier injured his rectus abdominis muscle while installing a five horsepower motor utilizing a 100' crane. This injury occurred in 1999. He has been unable to work since that injury. There does not appear to be any surgical approach that would be amenable to alleviating his pain. During the evaluation and work-up of that pain an MRI scan of the abdomen indicated calcific plaques along the hemidiaphragm. A chest x-ray in December of 1998 also indicated a calcific pleural plaque along the right hemidiaphragm.

Mr. Chevalier began working for Electric Boat, Quonset Division in 1976. He was hired as a plumber/maintenance person and was involved in sandblasting activities. In Building 488 where he spent a majority of his time there was active sandblasting and blowing of dust off of pipes. There was asbestos dust and mineral dust throughout the environment and he was only wearing a protective dust mask. Other workers were wearing air fed respirators. He does admit that at times while walking through the yard respiratory protection was not utilized. In 1980 during a routine health surveillance that was performed at Electric Boat he was told that his pulmonary function tests were much worse and he had a job reassignment. He was placed in working in crane maintenance and although this was a different assignment, it still involved working in the same building, only in a separate area. However, this area of the building had significant dust from sandblasting and asbestos material. He worked in the crane maintenance shop until 1999. He started to notice some difficulty with his breathing in 1980 and began utilizing metered dose inhalers from his family physician, Dr. Alfred Arcand. He has also been evaluated and followed by Dr. Elizabeth Dolly, who is a pulmonary specialist in the Warwick area.

Mr. Chevalier worked for Falstaff Brewery for 10 years prior to beginning his employment at Electric Boat. There he was involved with driving trucks and maintenance. There was no exposure to asbestos at that time.

Mr. Chevalier was a smoker. He smoked approximately one pack of cigarettes per day for 20 years starting at the age of 20 and quitting at the age of 40. He has not had a cigarette in over 20 years.

Presently he still complains of right upper quadrant abdominal pain and persistent dyspnea with exertion.

On examination today, his pulse is 100. BP 140/70. His O2 saturation on room air was 98%.

His oral mucosa is moist. The neck is without any adenopathy.

Trachea is midline . . .

Pulmonary function data today indicates an FVC of 2.02 liters or only 55% of the predicted. However, after the administration of a bronchodilator it was improved by 48% to 2.98 liters. The FEV1, however, did not show such a dramatic improvement. At baseline it was 0.62 liters and although it improved by 26%, it still was severely reduced to 0.78 liters. The lung volumes indicate severe pulmonary overinflation with a residual volume of 3.89 liters or 175% of predicted. Diffusion capacity is moderately reduced to 13.0 ml/min or only 62% of predicted. Arterial blood gases were obtained from the patient from a right radial artery puncture while he was at rest inspiring room air. His pH was 7.48, pCAO2 was 33 torr, pAO2 was 82 torr, HCO3 was 26.3 mmol/L and O2 saturation was 96.6%

The patient's chest x-rays were reviewed from Tollgate Radiology and there is significant pulmonary overinflation with flattened hemidiaphragms, all consistent with obstructive airways disease.

In summary, Mr. Chevalier has a severe respiratory impairment. His disease is consistent with obstructive airways disease. His obstructive airways disease is more probably than not related to his chronic exposures in the work environment. At this time he appears to be at maximum medical improvement and he needs to continue with his present medications as outlined by his physicians. At this time I do not believe that claimant would be able to return to work due to his significant respiratory impairment. Work exposures would certainly aggravate his condition.

Based upon AMA Guidelines utilizing the 4th Edition of **Guides to the Evaluation of Permanent Impairment**, Mr. Chevalier falls into a Class IV, 51-100% impairment of the whole person. This permanency rating is obtained from utilizing the parameters after his maximum improved post bronchodilator administration.

Based upon the note from Dr. Dolly date 11/6/00 her rating appears to be consistent with the guidelines offered by the AMA. Utilizing a single best percentage number taking into account all of the patient's diagnostic testing and symptoms, I would utilize a 75% impairment as best describing Mr. Chevalier's respiratory disability.

The patient's chest x-ray does demonstrate a pleural calcified plaque and this indicates significant asbestos exposure with resultant pleural related asbestos disease.

I do not believe there were any prior injuries or any pre-existing conditions that led to Mr. Chevalier's disability. What would be helpful in clarifying this statement would be pulmonary function testing that was performed prior to his employment in 1976 if that

was available. Certainly his smoking prior to 1976 would have played a role in his obstructive airways disease. However, I suspect that his asbestos fibers certainly aggravated his overall respiratory disability, according to the doctor.

The Employer has also referred Claimant for an evaluation by Dr. John A. Pella, also a pulmonary specialist, and the doctor sent the following letter to the medical agency (CX 3):

Mr. Chevalier was evaluated in my office at your request for an Independent Medical Examination on 6/19/01 regarding his respiratory condition. Provided for the purposes of the exam were office notes and pulmonary function testing reports of Elizabeth Dolly, M.D., his pulmonologist, and the office of Philip J. Riley, M.D. In addition, the patient brought his chest x-rays from 1998, 1999 and 2000 for my personal review.

Mr. Chevalier's clinical complaint is that of shortness of breath with exertion. He currently is able to walk approximately a quarter of a mile on level ground before becoming dyspneic. Inclines or climbing more than one to two flights of stairs will cause dyspnea to the degree that he may have to stop to rest. The onset of the complaint was insidious but has been notable for "several" years. Initially he was made aware of a respiratory problem after spirametric testing surveillance at Electric Boat when he failed to meet respiratory standards for his job description. This resulted in a transfer to another division within the facility. Several years later, Dr. Alfred Arcand, his primary care physician, began treatment for shortness of breath with Slobid 200mg, bid (a bronchodilator pill) and albuterol inhaler which has been somewhat effective in relieving his dyspnea. In addition to dyspnea, he currently has occasional wheezing accompanied by a daily cough and clear color sputum production. He denies demoptyais or chest pains. He denied any recent respiratory infection.

In early 1999 he developed an abdominal muscle pull/tear for which he was evaluated surgically. In the course of that evaluation an MRI or CT scan of the abdomen was performed which incidently revealed a right-sided diaphragmatic pleural plaque which was confirmed by plain chest x-ray. To my knowledge a CT scan of the chest has not been performed. He was referred to Dr. Dolly, a pulmonologist who first saw him in January, 1999. Pulmonary function testing was performed and demonstrated severe airways obstruction with a borderline reduction of the single breath diffusion capacity. Dr. Dolly continues to treat him on a regular basis and initiated inhaler therapy with Serevent MDI, 2-puffs q-12hrs, and Flovent MDI (unknown dose) 2-puffs, q-12hrs. He also continues to use albuterol inhaler at a frequency of 2-puffs, four times a day. He described dyspnea as somewhat variable on a day-t-day basis and, at times, is affected by weather change. He is able to swim a "lap" at a time at the local pool on a regular basis two

days a week.

His medical history is notable for Type II diabetes mellitus treated with an oral agent and systemic hypertension treated with Vasotac. He denies allergies, previous surgery and, specifically, any hospitalizations or emergency room visits for treatment of respiratory problems. He is an ex-cigarette smoker of a pack-per-day from age eighteen until he quit in 1982. He has a pet dog at home.

His occupational history is notable for employment at the Falstaff Brewing Company as a “driver” for ten years until 1976. He denies any significant exposures at that facility. To my knowledge there had been some question of asbestos problems within that facility but it does not appear that Mr. Chevalier was in that area for the building. He began work at the Electric Boat, the Quonset Point facility in 1976. During his first year he worked as a “sand-blaster” and then was transferred to the “maintenance division” where he was involved primarily with plumbing activities.

He serviced sand-blasting equipment while working in building #488 where final welding was performed on ship hulls which were then sand-blasted and painted. He describes dust exposure as “intense” at times with the air so laden he could not see more than fifteen to twenty feet. He wore a paper dust mask for protection although co-workers in that facility wore air-fed respirators. The sand-blasting process disrupted asbestos insulation which would blow into the air. He worked in that building for approximately four years until he “failed” surveillance spirometry testing in 1982 which resulted in his transfer to the “crane shop” which he also described as quite “dusty.” Finally he was transferred to the “maintenance” building where he worked for twenty-three years until his retirement in November, 1999. He believes there may be some asbestos exposure from insulation on the ovens and piping.

His weight has been relatively stable since retirement. He denies cardiac problems. He continues to treat with Dr. Arcand on a yearly basis and with Dr. Dolly twice yearly with periodic pulmonary function tests and chest x-rays.

Physical examination revealed Mr. Chevalier to be in no distress and cooperative with the examiner. Weight 168lbs, B/P 130/80. His throat was clear. There was no stridor, voice change, dysphonia, or oral thrush. There was hyperresonance to chest percussion and diminished breath sounds on ascultation bilaterally. There were crackles approximately one quarter up both right and left side posteriorly which did not clear with coughing. Cardiac exam was unremarkable. The abdomen was generally non-tender except for tenderness in the right upper quadrant over the muscle tear. There was borderline digital clubbing. There was no peripheral edema.

Available for my review were chest x-rays from 1998, 1999 and 2000.

A more recent film done, performed by Dr. Dolly, was not available. These films demonstrate pulmonary hyperinflation and generally diminished lung markings. There is on (sic?) cardiomegaly. Some blunting of the coatrophrenic angles bilaterally is present. The lateral film of 1998 films shows a linear, right sided hemidiaphragmatic calcification. There may be a small pleural plaque over the left mid-lung field. Limited spirometry was performed in my office. Effort for testing was good. The study demonstrated a post-bronchodilator FVC of 2.02 liters (52% of predicted); FEV one second of .83% liters (26% of predicted). Available were previous reports for my review which included a blood theophylline level of 5.3 on 5/18/01 (slightly low); pulmonary function testing on January 17, 2000 with a DLCO of 57% of predicted and an FEV one second of 580cc increasing to 770cc after inhaled bronchodilator. The FVC was 1.95 liters improving dramatically to 3.27 liters from 1/19/00 describes pulmonary "hyperinflation."

In summary, Mr. Chevalier's clinical complaint is that of shortness of breath with exertion. His dyspnea appears to be the result, primarily, of chronic obstructive pulmonary disease which is predominantly emphysema but has a significant bronchospeatic or asthmatic component. In addition, he has a superimposed respiratory impairment related to occupational asbestos dust exposure. His respiratory repetitive abnormal pulmonary function testing place him in a Class IV category of permanent impairment of the whole man attributable to his respiratory disease per the **AMA Guide to Evaluation of Permanent Impairment**. Clinically, his physical capabilities exceed somewhat the capacity which would be expected from testing. The diffusion capacity measurement is noted to be highly variable and changing rapidly and the value may not be accurate for technical reasons.

I would assess Mr. Chevalier as having a 65% impairment of the whole person on a respiratory basis. I would attribute 30% (of the 65%) to his cigarette smoking history, 25% (of the 65%) to occupational exposures to dust and fumes. Approximately 10% of his total impairment I would attribute to asbestos-related lung disease. The basis of this diagnosis is the presence of pleural plaques indicating exposure, bilateral crackles heard on physical examination and borderline clubbing of the digits and mild reduction in diffusion capacity. Current medical treatment is appropriate and will be required indefinitely. He appears to be capable of sedentary level of activity on the basis of his clinical symptoms but is disabled for sustained exertional activity at the light level and has a permanent restriction regarding any exposure to environmental dusts, fumes and extremes of environmental temperatures, according to the doctor.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a most credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326

(1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234,

236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that working conditions existed which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d

185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The probative testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial evidence to negate the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999), **cert. denied**, 120 S.Ct. 40 (1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his asbestosis and his abdominal/rib cage injury, resulted from working conditions or resulted from his exposure to and inhalation of asbestos at the Employer's shipyard. The Employer has not introduced substantial evidence severing the connection between such harm and Claimant's maritime employment. In this regard, **see Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989). Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as

naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszie wicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

The closed record conclusively establishes, and I so find and conclude, that Claimant's work activities on November 7, 1998 resulted in an abdominal/rib cage injury, that Claimant's work

activities also exposed him, on a daily basis, to asbestos and other deleterious injurious stimuli, that such exposures resulted in an diagnosis of pulmonary asbestosis with both restrictive and obstructive components on October 25, 1999, that the Employer had timely notice of both injuries, has authorized certain medical treatment and has paid certain compensation benefits for the November 7, 1998 injury (EX 2, EX 3), that the Employer timely controverted Claimant's entitled to additional benefits (EX 5, EX 6) and that Claimant timely filed for benefits once a dispute arose between the parties. (CX 1) The remaining issues are whether or not additional benefits for the 1998 injury are foreclosed by the Full Faith and Credit Clause of the U.S. Constitution and, if not, the nature and extent of Claimant's disability, issues that I shall now resolved.

RES JUDICATA, COLLATERAL ESTOPPEL, FULL FAITH AND CREDIT, AND ELECTION OF REMEDIES

It is well settled that mere acceptance of payments under a state act does not constitute an election of remedies barring a subsequent claim under the Longshore Act. **Calbeck v. Travelers Insurance Co.**, 370 U.S. 114, 82 S.Ct. 1196 (1962); **Holland v. Harrison Brothers Dry Dock and Repair Yard**, 306 F.2d 369 (5th Cir. 1962). However, the employer must be given credit for sums paid for such injury under the state act. **Calbeck**, **supra**.

When an employee files claims in more than one forum, the employer may raise defenses such as **Res Judicata**, Full Faith and Credit and Election of Remedies. Full Faith and Credit is mandated by Article IV, Section I, of the United States Constitution. **Director, OWCP v. National Van Lines**, 613 F.2d 972, 981, 11 BRBS 298, 308-309 (D.C. Cir. 1979).

The doctrine of **Res Judicata** requires that the determination made in an earlier proceeding occur after a full and fair adjudication of its legal and evidentiary factors in order to be binding. **United States v. Utah Construction and Mining Co.**, 384 U.S. 394 (1966) (review of the record had made it clear to the court that proceedings afforded claimant in Virginia and the proof adduced before the state agency abundantly met this criterion, **i.e.**, whether or not the claimant had full and ample opportunity to present his case before the state agency).

The doctrine of Election of Remedies relates to the liberty or the act of choosing one out of several means afforded by law for the redress of an injury, or one out of several available forms of action. An "**Election of Remedies**" arises when one having two coexistent but inconsistent remedies chooses to exercise one, in which event he may lose the right to thereafter exercise the other. **Melby v. Hawkins Pontiac**, 13 Wash. App. 745, 537 P.2d 807, 810 (1975).

The general rule of Collateral Estoppel is that when an issue of **ultimate fact** has been determined by a valid judgment, that issue cannot be again litigated between the same parties in future litigation. **City of St. Joseph v. Johnson**, 539 S.W.2d 784, 785 (Mo. App. 1976). In **Kendall v. Bethlehem Steel Corp.**, 16 BRBS 3 (1983), the Board applied collateral estoppel to vacate an administrative law judge's findings regarding the same claimant and covering the same period of time of disability, an award which the Board had previously affirmed.

Res Judicata and Collateral Estoppel apply only after entry of a final order that terminates the litigation between the parties on the merits of the case. **St. Louis Iron Mountain & Southern Railway v. Southern Express Co.**, 108 U.S. 24, 28-29, 2 S.Ct. 6, 8 (1883); **Firestone Tire and Rubber Co. v. Risjord**, 449 U.S. 368, 373, 101 S.Ct. 669, 673 (1981).

Moreover, **Res Judicata** and Collateral Estoppel do apply to administrative agencies acting in a judicial capacity resolving disputed issues of fact properly before it, which issues the parties have had an adequate opportunity to litigate. **United States v. Utah Mining and Construction Co.**, 384 U.S. 394 (1966).

Although a state court opinion could collaterally estop the litigant from debating the scope of state court jurisdiction in a subsequent claim, **Shea v. Texas Employers Insurance Assoc.**, 383 F.2d 16 (5th Cir. 1967), the question of state court jurisdiction is simply not relevant in a subsequent claim pursued under the Longshore Act. **See generally** A.Larson **Workmen's Compensation Law** §§89.53(b) and (c) (1990); **Simpson v. Director, OWCP**, 681 F.2d 81, 14 BRBS 900 (1st Cir. 1982), **vac'g and remanding** 13 BRBS 970 (1986), **cert. denied**, 459 U.S. 1127, 103 S.Ct. 762 (1983). **See also Simpson v. Bath Iron Works Corp.**, 22 BRBS 25 (1989) (**Decision and Order After Remand**).

In **Kelaita v. Triple A Machine Shop**, 17 BRBS 10 (1984), **aff'd**, 799 F.2d 1308 (9th Cir. 1986), the Board held that the judge's original finding that the later employer was not responsible for claimant's injury was not **Res Judicata** because it was based on an erroneous application of law. However, on remand, the judge may consider intervening changes in the law in complying with the Board's mandate. **See generally White v. Murtha**, 377 F.2d 428, 431-32 (5th Cir. 1967); **Thornton v. Brown & Root**, 23 BRBS 75, 77 (1989).

In **Thomas v. Washington Gas Light Co.**, 448 U.S. 261, 12 BRBS 828 (1980), a four member plurality of the Supreme Court held that the Full Faith and Credit Clause does not preclude successive compensation awards. The Court considered the different interests affected by the potential conflicts between the two jurisdictions from which claimant sought compensation and concluded that Virginia had no legitimate interest in preventing the District of Columbia

from granting a supplemental award to a claimant who had been granted a Virginia award, where the District would have had the power to apply its workers' compensation law in the first instance.

Three justices concurred in the result of the plurality, but relied on the rationale of **Industrial Commission of Wisconsin v. McCartin**, 330 U.S. 622, 67 S.Ct. 886 (1947). The rule of **McCartin** permitted a state, by drafting its statute in "unmistakable language", to preclude an award in another state. **The concurrence found that the Virginia statute lacked the "unmistakable language" required to preclude a subsequent award in the District of Columbia.** (Emphasis added)

In **Sun Ship, Inc. v. Commonwealth of Pennsylvania**, 477 U.S. 715, 100 S.C. 2432 (1980), the Supreme Court held that state and Longshore Act jurisdiction may run concurrently in areas where state law constitutionally may apply.

Following **Thomas**, the Board held that an award of compensation under the Virginia Workers' Compensation Act did not operate as a bar to a supplemental award based on the same injury under the District of Columbia Workmen's Compensation Act. **Murphy v. Honeywell, Inc.**, 12 BRBS 856 (1980). **See also Dixon v. McMullen and Associates, Inc.**, 13 BRBS 707 (1981) (Miller, concurring in result only) (Smith, concurring in part and dissenting in part) (three opinion decision holding that neither the Full Faith and Credit Clause nor the doctrines of collateral estoppel and election of remedies barred a longshore claim brought subsequent to a settlement agreement under a state workers' compensation statute).

In **Landry v. Carlson Mooring Service**, 643 F.2d 1080, 13 BRBS 301 (5th Cir. 1982), **rev'g** 9 BRBS 518 (1978), **cert. denied**, 454 U.S. 1123 (1981), the court, citing **Thomas** and **McCartin**, held that the Full Faith and Credit Clause did not prevent claimant, who had a judicially approved settlement under the Texas workers' compensation statute, from asserting a claim under the Longshore Act. Claimant, however, would have to credit his state benefits against any recovery under the Longshore Act. **Election of remedies was held inapplicable in the absence of an indisputable state declaration precluding pursuit of a subsequent longshore claim.** (Emphasis added)

Similarly, in **Simpson v. Director, OWCP**, 681 F.2d 81, 14 BRBS 900 (1st Cir. 1982), **rev'g on other grounds** 13 BRBS 970 (1981), **cert. denied**, 459 U.S. 1127 (1983), the court held that a state court award did not collaterally estop claimant from bringing a claim under the Longshore Act. The court held that although a state court opinion could collaterally estop a litigant from debating the scope of state court jurisdiction, the question of state court jurisdiction was not relevant under the federal Act. That Congress authorized federal compensation for all injuries to employees on navigable waters was to be accepted regardless of what

a particular claimant recovered under state law. The court held further that **Res Judicata** was inapplicable since claims under the Longshore Act may not be pressed in state court.

In **Jenkins v. McDermott, Inc.**, 734 F.2d 229, 16 BRBS 102 (CRT) (5th Cir. 1984), a tort suit, the court held that where the Longshore Act and the state workers' compensation law were concurrently applicable, but nothing in the record indicated that claimant had elected his state benefits over the federal remedy, the district court could not grant summary judgment to a third party defendant on the basis of a provision of the state statute barring claims against third parties. The court held that application of the state bar to recovery could not survive an election of the federal remedy in view of the Longshore Act's purpose to provide uniformity of treatment to all maritime workers and the fact that Louisiana, the situs state, was the only jurisdiction whose workers' compensation law barred recovery against employer's principals. On rehearing, the court vacated its earlier opinion insofar as it reversed the district court's summary dismissal of claimant's negligence and strict liability claims against employer's principal. The court noted that the Supreme Court's decision in **W.M.A.T.A. v. Johnson**, 467 U.S. 925, 104 S.Ct. 2827 (1984), cast doubt on its previous holding that under the Longshore Act the principal had no immunity from a tort suit by an employee of its contractor. **Jenkins v. McDermott, Inc.**, 742 F.2d 191, 16 BRBS 140 (CRT) (5th Cir. 1984) (**On Petitions for Rehearing and Suggestions for Rehearing En Banc**).

As the Rhode Island statute does not contain the "unmistakable language" precluding a subsequent claim under the Longshore Act, I find and conclude that this claim is not barred by the defenses raised by the Employer. Cases cited by the Employer in support of their respective positions are inapposite herein, as shall be further discussed below.

Moreover, the Rhode Island statute and the Act differ in certain material respects, such as the burden of proof, the extent of the presumption found in Section 20(a) of the Act and the differing nature of the awards sanctioned by the statute and the Act. In fact, this case clearly manifests this latter difference in that the statute permits awards for scarring resulting from surgery related to a work injury, an award not permitted by the Act. In this regard, **see D'Ericco v. General Dynamics Corporation**, 996 F.2d 503, 27 BRBS 24 (CRT) (1st Cir. 1993).

The United Court of Appeals for the First Circuit issued a landmark decision on September 10, 1997 in **Bath Iron Works v. Director, OWCP**, (**Acord**) 125 F.3d 18, 31 BRBS 109 (CRT)(1st Cir. 1997), wherein the Court held, **inter alia**, that this Court must grant Full Faith and Credit to a final decree of the Maine Workers' Compensation Commission.

In several significant decisions the Board has refused to follow **Acord** and, in fact, has attempted to distinguish the legal implications of that landmark decision by the U.S. Court of Appeals for the First Circuit. In this regard, **see Plourde v. Bath Iron Works Corporation, et al.**, 34 BRBS 45, 46-49 (2000). **See also Dunn v. Lockheed Martin Corporation**, 33 BRBS 204 (1999).

On this issue, I agree with the Employer as to the legal effect of the **Acord** decision, especially as **Acord** is a matter over which I presided. However, as the Board has somehow distinguished **Acord**, I am constrained to follow its decision in **Plourde**. This issue will certainly again be presented to the U.S. Circuit Court for the First Circuit, along with several other cases involving the shipyard in Bath, Maine.

Accordingly, that decree (EX 3) is not binding herein, as there is concurrent jurisdiction between this forum and the State of Rhode Island and Providence Plantation, and I shall now resolve the remaining issues.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show

that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to any work at the shipyard. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit probative and persuasive evidence as to the availability of suitable alternate employment, as shall be further discussed below. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability except during those periods of time he was working, as further discussed below.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support**

Department, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **See Watson v. Gulf**

Stevedore Corp., 400 F.2d 649 (5th Cir. 1968), **cert. denied**. 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. **Louisiana Ins. Guaranty Assn. v. Abbott,** 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994); **Leech v. Service Engineering Co.,** 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. **Kuhn v. Associated press**, 16 BRBS 46 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. **Worthington v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 200 (1986); **White v. Exxon Corp.,** 9 BRBS 138 (1978), **aff'd mem**., 617 F.2d 292 (5th Cir. 1982).

On the basis of the totality of the record, I find and conclude that Claimant has been permanently and totally disabled from November 4, 1999, when he was forced to discontinue working as a result of his work-related injury and his occupational pulmonary disease.

With reference to Claimant's residual work capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage

levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).

It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of his injury**. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law in the First Circuit that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternate employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken on this issue many times and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer

is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

As indicated above, the Employer has offered a Labor Market Survey (EX 13) in an attempt to show the availability of work for Claimant as a security guard, parking attendant, ticket agent, as well as a theater usher and parking garage cashier. I cannot accept the results of that very superficial survey which apparently consisted of the counsellor making a number of telephone calls to prospective employers. While the report refers to personal contacts with area employers, I simply cannot conclude, with any degree of certainty, which prospective employers were contacted by telephone and which job sites were personally visited to observe the working conditions to ascertain whether that work is within the doctor's restrictions and whether Claimant can physically do that work.

It is well-settled that the Employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Employer must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

The Labor Market Survey (EX 13) cannot be relied upon by this Administrative Law Judge for the more basic reason that there is a complete absence of any information (1) about the specific nature of the duties of those jobs identified by the Employer and (2) whether such work is within the doctor's physical restrictions. Thus, this Administrative Law Judge has absolutely no idea as to what are the duties of those jobs at the firms identified by the Employer.

Another reason to reject the labor market survey is the fact that the Employer did not make available Ms. Dolan for her post-hearing deposition and Claimant's inability (EX 14) to cross-examine Ms. Dolan has deprived him of his due process rights to test the nature and extent of the opinions expressed by Ms. Dolan in her reports. In this regard, **see Richardson v. Perales**, 402 U.S. 389 (1971).

I am cognizant of the fact that the controlling law is somewhat different on the employer's burden in the territory of the

First Circuit when faced with a claim for permanent total disability benefits. In **Air America, Inc. v. Director, OWCP**, 597 F.2d 773, 10 BRBS 490 (1st Cir. 1978), the United States Court of Appeals for the First Circuit held that it will not impose upon the employer the burden of proving the existence of actual available jobs when it is "obvious" that there are available jobs that someone of Claimant's age, education and experience could do. The Court held that, when the employee's impairment only affects a specialized skill necessary for his pre-injury job, the severity of the employer's burden had to be lowered to meet the reality of the situation. In **Air America**, the Court held that the testimony of an educated pilot, who could no longer fly, that he received vague job offers, established that he was not permanently disabled. **Air America**, 597 F.2d at 778, 780, 108 BRBS at 511-512, 514. Likewise, a young intelligent man was held to be not unemployable in **Argonaut Insurance Co. v. Director, OWCP**, 646 F.2d 710, 13 BRBS 297 (1st Cir. 1981).

In view of the foregoing, I cannot accept the results of the Labor Market Survey because, without the required information about each job, I simply am unable to determine whether or not any of those jobs constitutes, as a matter of fact or law, **suitable** alternate employment or **realistic** job opportunities. In this regard, **see Armand v. American Marine Corporation**, 21 BRBS 305, 311, 312 (1988); **Horton v. General Dynamics Corp.**, 20 BRBS 99 (1987). **Armand** and **Horton** are significant pronouncements by the Board on this important issue.

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985). A loss of wage-earning capacity is not negated by Claimant's retirement on November 2, 1999 as I have credited his testimony that he was unable to work at that time and would have liked to continue working until age 65. **MacDonald v. Bethlehem Steel Corp.**, 18 BRBS 181 (1986).

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury,

whether for the same or another employer, during **substantially** the whole of the year immediately preceding his injury. **Mulcare v. E.C. Ernst, Inc.**, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, **i.e.**, whether it is intermittent or permanent, **Eleazar v. General Dynamics Corporation**, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, **O'Connor v. Jeffboat, Inc.**, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. **Lozupone v. Stephano Lozupone and Sons**, 12 BRBS 148, 156 and 157 (1979). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. **Hole v. Miami Shipyards Corp.**, 12 BRBS 38 (1980), **rev'd and remanded on other grounds**, 640 F.2d 769 (5th Cir. 1981). The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. **See O'Connor v. Jeffboat, Inc.**, 8 BRBS 290 (1978). **See also Brien v. Precision Valve/Bayley Marine**, 23 BRBS 207 (1990); **Klubnikin v. Crescent Wharf & Warehouse Co.**, 16 BRBS 183 (1984). Moreover, since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment. **See Waters v. Farmer's Export Co.**, 14 BRBS 102 (1981), **aff'd per curiam**, 710 F.2d 836 (5th Cir. 1983); **Duncan v. Washington Metropolitan Area Transit Authority**, 24 BRBS 133, 136 (1990); **Gilliam v. Addison Crane Co.**, 21 BRBS 91 (1987). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," **Duncan**, **supra**, but 33 weeks is not a substantial part of the previous year. **Lozupone**, **supra**. Claimant worked for the Employer for the prior 52 weeks. Therefore Section 10(a) is applicable.

On the other hand, the Employer submits that Claimant is a voluntary retiree and that his benefits for his pulmonary injury should be based upon the National Average Weekly Wage in effect as of October 25, 1999.

The 1984 Amendments to the Longshore Act apply in a new set of rules in occupational disease cases where the time of injury (**i.e.**, becomes manifest) occurs after claimant has retired. **See Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985); 33 U.S.C. §§902(10), 908(C)(23), 910(d)(2). In such cases, disability is defined under Section 2(10) not in terms of loss of earning capacity, but rather in terms of the degree of physical impairment as determined under the guidelines promulgated by the American Medical Association. An employee cannot receive total disability benefits under these provisions, but can only receive a permanent partial disability award based upon the degree of physical impairment. **See** 33 U.S.C. §908(c)(23); 20 C.F.R. §702.601(b). The Board has held that, in appropriate circumstances, Section 8(c)(23) allows for a permanent

partial impairment award based on a one hundred (100) percent physical impairment. **Donnell v. Bath Iron Works Corporation**, 22 BRBS 136 (1989). Further, where the injury occurs more than one year after retirement, the average weekly wage is based on the National Average Weekly Wage as of the date of awareness rather than any actual wages received by the employee. **See** 33 U.S.C. §910(c)(2)(B); **Taddeo v. Bethlehem Steel Corp.**, 22 BRBS 52 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 46 (1989). Thus, it is apparent that Congress, by the 1984 Amendments, intended to expand the category of claimants entitled to receive compensation to include voluntary retirees.

However, in the case at bar, Claimant may be an involuntary retiree if he left the workforce because of work-related pulmonary problems. Thus, an employee who involuntarily withdraws from the workforce due to an occupational disability may be entitled to total disability benefits although the awareness of the relationship between disability and employment did not become manifest until after the involuntary retirement. In such cases, the average weekly wage is computed under 33 U.S.C. §910(C) to reflect earnings prior to the onset of disability rather than earnings at the later time of awareness. **MacDonald v. Bethlehem Steel Corp.**, 18 BRBS 181, 183 and 184 (1986). **Compare LaFaille v. General Dynamics Corp.**, 18 BRBS 882 (1986), **rev'd in relevant part sub nom. LaFaille v. Benefits Review Board**, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989).

Thus, where disability commences on the date of involuntary withdrawal from the workforce, claimant's average weekly wage should reflect wages prior to the date of such withdrawal under Section 10(c), rather than the National Average Weekly Wage under Section 10(d)(2)(B).

However, if the employee retires due to a non-occupational disability prior to manifestation, then he is a voluntary retiree and is subject to the post-retirement provisions. In **Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985), the Benefits Review Board applied the post-retirement provisions because the employee retired due to disabling non-work-related heart disease prior to the manifestation of work-related asbestosis.

On the basis of the totality of this closed record, I find and conclude that Claimant is an involuntary retiree as he was forced to stop working on November 3, 1999 (1) because of the cumulative effects of his 1998 and 1999 injuries, (2) because he had been treating for such injuries since January 19, 1999 (CX 2A), (3) because his pulmonary function tests, as of January 19, 1999, clearly manifest a permanent impairment described as "moderately severe" (CX 26), (4) because the Employer was aware of such injuries, and 5) because Claimant was restricted to light duty clerical work from at least November 12, 1998 (CX 8 at 1) to at least September 9, 1999 (CX 8 at 43), the last entry in Claimant's

Dispensary Medical Records.

That Claimant signed papers presented to him by the Employer (EX 16) does not preclude his status as an involuntary retiree as he was told by the Employer to sign that document if he wished to receive his pension benefits as soon as possible. If Claimant did not sign, he would have to wait at least the three (3) years for this decision to be issued and possibly as much as an additional fourteen (14) months for the Board to issue its decision.

Moreover, in view of the foregoing, I find and conclude that Claimant is an involuntary retiree, that he is permanently and totally disabled and that an appropriate award will be entered herein.

Furthermore, Claimant's benefits for his pulmonary injury shall be based upon the stipulated average weekly wage of $602.39, and I so find and conclude.

Moreover, I find and conclude that Claimant is entitled to an award of temporary partial benefits from April 23, 1999 through November 3, 1999 at the weekly rate of $182.45, computed as follows: $876.07 - $602.39 = $273.68 x 2/3 = $182.45. A comparison of Claimant's average weekly wages for his 1998 and 1999 injuries clearly demonstrates a partial loss of wage-earning capacity. This award shall continue after November 3, 1999, at which time he is entitled to permanent and total benefits, as further discussed below.

Pursuant to long-standing Board precedents, Claimant's partial award for his abdominal injury shall continue after November 4, 1999 as his total weekly benefits of $182.45 (for his abdominal injury) and $401.60 (for his pulmonary injury) do not exceed the maximum compensation rate as of October 1, 1999, **i.e.**, $901.28.

In this regard, **see Hastings v. Earth Satellite Corp.**, 8 BRBS 519 (1978), **aff'd and rev'd in part**, 628 F.2d 85 (D.C. Cir. 1980). **See also Brady-Hamilton Stevedore Co. v. Director, OWCP**, 29 BRBS 101 (CRT) (9th Cir. 1995); **Bouchard v. General Dynamics Corp.**, 14 BRBS 839 (1982).

The partial benefits shall change from temporary to partial on November 4, 1999, as this is the date on which Claimant's abdominal and pulmonary injuries became permanent. Appropriate awards will be entered herein.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone**

v. Todd Shipyards Corp., 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd**

on other grounds, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injuries in a timely manner and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, the Employer shall authorize and pay for such reasonable and necessary treatment as relates to his November 7, 1998 and October 25, 1999 injuries, subject to the provisions of Section 7 of the Act. Benefits for Claimant's November 7, 1998 injury shall begin on that date and benefits for his October 25, 1999 injury shall begin on January 19, 1999, the date on which Dr. Dolly diagnosed his pulmonary problems as being work-related.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted Claimant's entitlement to benefits. (EX 5, EX 6, EX 8) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **Director, OWCP v. Luccitelli**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992), **rev'g Luccitelli v. General Dynamics Corp.**, 25 BRBS 30 (1991); **Director, OWCP v. General Dynamics Corp.,** 982 F.2d 790 (2d Cir. 1992); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries**

Northwest, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

An x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. **Topping v. Newport News Shipbuilding**, 16 BRBS 40 (1983); **Musgrove v. William E. Campbell Co.**, 14 BRBS 762 (1982).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202

(CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

The Employer has submitted an application for 8(f) relief in connection with the above captioned claim. (EX 19)

As noted above, Claimant has demonstrated a rib cage injury on November 7, 1998 and a lung injury on October 25, 1999 and appropriate awards therefore will be entered herein.

As already noted above, Section 8(f) shifts the liability to pay for permanent partial and permanent total disability or death after 104 weeks from the employer to the Special Fund, established in Section 44 of the Act, 33 U.S.C. Section 908(f). An employer may be granted Special Fund relief in a case where the claimant is permanently partially disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, that this current permanent partial disability is not due solely to the work injury, but "is materially and substantially greater than that which would have resulted from the subsequent injury along." 33 U.S.C. Section 98(f)(1). An employer must show, by medical or other evidence, that a claimant's subsequent injury alone would not have caused the claimant's total permanent disability. **Director, OWCP v. Luccitelli**, **supra**, **Director, OWCP v. General Dynamics Corp. (Bergeron), supra**.

Relative to the lung claim, there is no question that the Claimant suffered from a pre-existing condition, which has substantially and significantly contributed to his current disability. To begin with, the Claimant has a thirty-year smoking history. As in **General Dynamics Corp. v. Sacchetti**, 681 F.2d 37 (1st Cir. 1982), cigarette smoking is a qualifying disability once it results in "medically cognizable symptoms that physically impair the employee." Dr. Pella attributed 30% of the 65% lung impairment to cigarette smoking.

The Claimant began his employment at Electric Boat in 1976. Electric Boat Yard Hospital Records, identified pleural thickening on s-rays performed as early as December 5, 1977 (**see** EX 2). His lungs were slightly emphysematic. Pulmonary function studies conducted on December 19, 1978 (EX 2) were abnormal and showed a moderate obstructive impairment with a significant degree of broncho spasms. There was evidence to suggest emphysema. He reported at that time that he was a 1 ½ pack per day cigarette smoker for 15 years. This diagnosis was confirmed on subsequent x-

rays and further pulmonary function tests. During pulmonary testing on May 7, 1981, (EX 4) the Claimant reported a smoking history of one pack per day for 27 years. Clearly, the standard set by the Court in **Sacchetti**, is met.

As already found above, Claimant has established that he has a rib cage injury (EX 12 and EX 13) and that he is permanently totally disabled as a result of the two injuries. The lung injury and rib cage injury merge to create a permanent total disability. In other words, the disability of the lung injury and subsequent rib cage injury, is greater than what would have resulted from the first injury alone. It is uncontradicted that these two conditions produced a far more significant impairment for the Claimant than would have otherwise been the case, and I so find and conclude.

Existing permanent partial disability must contribute to the subsequent permanent disability following the last injury. The factors to consider include pre-existing condition which must contribute to the permanent disability. **Director, OWCP v. Newport News Ship Building and Dry Dock Company**, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982). The employee's testimony and the medical evidence submitted here by both parties established that the Claimant had a pre-existing permanent disability prior to the rib case injury.

In cases of permanent partial disability, the employer must also prove that the claimant's current level of disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. §908(f)(1). The Claimant satisfies this additional requirement for 8(f) relief. The rib cage injury combined with the pre-existing lung injury, which was manifest to the employer, and the resulting disability is not due solely to the rib cage injury.

Claimant credibly testified at the trial before me that prior to the rib cage injury he had no lost time from work. (EX 1; TR 38) After that injury, he could no longer do his job due to the pain in his rib cage in addition to his lung problem. (EX 1; TR 47) As the Claimant is determined permanent and totally disabled, the additional 8(f) requirement is satisfied since his disability is greater than that which would have resulted from the second rib cage injury alone.

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant worked for the Employer from 1976 to November 2, 1999, (2) that he has sustained previous work-related industrial accidents prior to November 2, 1999, (3) while working at the Employer's shipyard and (4) that Claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability and his November 2, 1999 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of

permanent disability. **See Atlantic & Gulf Stevedores v. Director**, OWCP, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final injury on October 25, 1999, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has consistently held that, except in hearing loss cases, Section 8(f) only applies to schedule injuries exceeding 104 weeks. **Byrd v. Toledo Overseas Terminal**, 18 BRBS 144, 147 (1986); **Strachan Shipping Co. v. Nash**, 15 BRBS 386, 391 (1983), **aff'd in relevant part**, 760 F.2d 569 (5th Cir. 1985), **on reconsideration en banc**, 782 F.2d 513 (5th Cir. 1986).

Section 8(f) relief is not available to the employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

In **Huneycutt v. Newport News Shipbuilding & Dry Dock Co.**, 17 BRBS 142 (1985), the Board held that where permanent partial disability is followed by permanent total disability and Section 8(f) is applicable to both periods of disability, employer is liable for only one period of 104 weeks. In **Huneycutt**, the claimant was permanently partially disabled due to asbestosis and then became permanently totally disabled due to the same asbestosis condition, which had been further aggravated and had worsened. Thus, in **Davenport v. Apex Decorating Co.**, 18 BRBS 194 (1986), the Board applied **Huneycutt** to a case involving permanent partial disability for a hip problem arising out of a 1971 injury and a subsequent permanent total disability for the same 1971 injury. **See also Hickman v. Universal Maritime Service Corp.**, 22 BRBS 212

(1989); **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78 (1989); **Henry v. George Hyman Construction Company**, 21 BRBS 329 (1988); **Bingham v. General Dynamics Corp.**, 20 BRBS 198 (1988); **Sawyer v. Newport News Shipbuilding and Dry Dock Co.**, 15 BRBS 270 (1982); **Graziano v. General Dynamics Corp.**, 14 BRBS 950 (1982) (where the Board held that where a total permanent disability is found to be compensable under Section 8(a), with the employer's liability limited by Section 8(f) to 104 weeks of compensation, the employer will not be liable for an additional 104 weeks of death benefits pursuant to Section 9 where the death is related to the injury compensated under Section 8 as both claims arose from the same injury which, in combination with a pre-existing disability resulted in total disability and death); **Cabe v. Newport News Shipbuilding and Dry Dock Co.**, 13 BRBS 1029 (1981); **Adams**, **supra**.

However, the Board did not apply **Huneycutt** in **Cooper v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 284, 286 (1986), where claimant's permanent partial disability award was for asbestosis and his subsequent permanent total disability award was precipitated by a totally new injury, a back injury, which was unrelated to the occupational disease. While it is consistent with the Act to assess employer for only one 104 week period of liability for all disabilities arising out of the same injury or occupational disease, employer's liability should not be so limited when the subsequent total disability is caused by a new distinct traumatic injury. In such a case, a new claim for a new injury must be filed and new periods should be assessed under the specific language of Section 8(f). **Cooper**, **supra**, at 286.

However, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, **ipso facto**, establish a pre-existing disability for purposes of Section 8(f). **American Shipbuilding v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. **Sacchetti v. General Dynamics Corp.**, 14 BRBS 29, 35 (1981); **aff'd**, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, **viz**, a defect in the human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), **aff'g**, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602

(3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee. **Sacchetti**, **supra**, at 681 F.2d 37.

In view of the foregoing and, as Claimant has sustained two separate and discrete injuries, the Employer is obligated to pay 104 weeks of permanent benefits for each injury.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after May 2, 2001, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition shall be filed within thirty (30) days after receipt of this decision and Employer's counsel shall have fourteen (14) days to comment thereon.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to the Claimant compensation for his temporary partial disability from April 23, 1999 through November 3, 1999 at the weekly rate of $182.45, such compensation to be computed in accordance with Section 8(e) of the Act.

2. Commencing on November 4, 1999, and continuing thereafter for 104 weeks, the Employer shall pay to the Claimant compensation benefits for his permanent partial disability, at the weekly rate of $182.45, such compensation to be computed in accordance with Section 8(c) of the Act.

3. The Employer shall also pay to the Claimant compensation benefits for his permanent total disability, plus the applicable adjustments provided in Section 10 of the Act, based upon his average weekly wage of $602.39, such compensation to be computed in accordance with Section 8(a) of the Act. These benefits shall

begin on November 4, 1999 and shall continue until further **ORDER** of this Court. The Employer shall pay these benefits for 104 weeks.

4. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

5. The Employer shall receive credit for any compensation previously paid to the Claimant as a result of his November 7, 1998 injury on and after April 23, 1999.

6. Interest shall be paid by the Employer and the Special Fund, on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

7. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injuries referenced herein may require, even after the time period specified in the second and third Order provisions above, subject to the provisions of Section 7 of the Act. Medical benefits for the 1998 injury shall begin on October 25, 1999 and benefits for the 1999 injury shall begin on January 19, 1999.

8. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on May 2, 2001.

A

DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts
DWD:jl